



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

Ms. Mindy Ward
City Attorney
City of San Angelo
P.O. Box 1751
San Angelo, Texas 76902

OR2004-3198

Dear Ms. Ward:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199718.

The San Angelo Regional Airport (the "airport") received a request for the monthly revenue of all rental car concessioners. Although you raise no exception to disclosure on behalf of the airport, you assert that the release of the requested information may implicate the proprietary interests of third parties. Accordingly, you notified the interested third parties, Avis Rent A Car System, Inc. ("Avis"), Budget Rent A Car System, Inc. ("Budget"), Enterprise Rent-A-Car ("Enterprise") and Hertz Rent A Car ("Hertz"), of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances).

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Hertz has submitted comments to this office explaining how release of the requested information would affect its

proprietary interests. Therefore, we have no basis to conclude that the release of the requested information will harm the proprietary interests of Avis, Budget, or Enterprise. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the airport must release the submitted revenue statements of Avis, Budget, and Enterprise.

We now address Hertz's arguments for withholding its revenue statement from disclosure. Initially, Hertz argues that its revenue statement should not be released because, as a private entity, the company's records are not subject to the Public Information Act (the "Act"). The Act applies to the information of a "governmental body" as that term is defined in section 552.003(1)(A) of the Government Code. This office has also determined that if a distinct part of a private entity is supported by public funds, the records relating to that part of the entity are subject to the Act, but records relating to parts of the entity not supported by public funds are not subject to the Act. Open Records Decision No. 602 (1992). The Act does not apply, however, to private persons or businesses simply because they provide goods or services under a contract with a governmental body. Open Records Decision No. 1 (1973) (concluding that bank that holds funds of governmental body is not subject to Act). Thus, we agree that a request to Hertz for its records is not appropriate under the Act. In this instance, however, the request was made to the airport for records it maintains in connection with the transaction of its official business. The fact that information maintained by a governmental entity pertains solely to a specific individual or business enterprise does not affect our determination of whether that information is subject to the Act. In making our determination, this office is bound by the statutory definition of "public information." See Gov't Code § 552.002 (defining "public information" for purposes of Gov't Code ch. 552). Therefore, after reviewing the arguments and the submitted record, we conclude that Hertz's submitted revenue statement falls squarely within the definition of "public information." Accordingly, we will address Hertz's claimed exceptions to disclosure.

Hertz first contends that the submitted revenue statement is protected from disclosure under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception incorporates the doctrines of common-law and constitutional privacy. See, e.g., Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy).

Common-law privacy protects information if (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this

office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). It must also be noted that common-law privacy protects only the rights of individuals, not corporations. See Open Records Decision No. 620 (1993) (corporation has no common-law privacy interest in its financial information); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. See *id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

Hertz explains that it leases office space within the airport. The fee for renting this space is ten percent of the company's monthly gross revenue. The submitted revenue statement contains Hertz's monthly gross revenue and other financial information used to calculate the amount of the monthly lease payment. In accordance with the terms of the lease agreement, the revenue statement must be submitted to the airport along with the lease payment. Based on Hertz's arguments and our review of the submitted information, we find that the revenue statement evidences a financial transaction with a governmental body. As previously noted, the public has a legitimate public interest in the details of this type of financial transaction. Moreover, a financial transaction of this type does not concern the "most intimate aspects of human affairs." Thus, we conclude that the revenue statement is not protected from disclosure under common-law or constitutional privacy.

Hertz also contends that the revenue statement is excepted from disclosure under section 552.102 of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This section applies to information in the

personnel file of an employee of a governmental body. Since the revenue statement is not information in the personnel file of an employee of a governmental body, we determine that section 552.102 does not apply to the revenue statement.

Next, Hertz contends that the revenue statement is excepted from disclosure under section 552.104 of the Government Code. This exception protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision Nos. 592 (1991)* (statutory predecessor to Gov't Code § 552.104 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the airport does not raise section 552.104, this section is not applicable to the information at issue. *See Open Records Decision No. 592 (1991)* (stating that governmental body may waive Gov't Code § 552.104). Therefore, the airport may not withhold Hertz's revenue statement under section 552.104.

Hertz further contends that the information at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by Hertz and the information at issue, we find that the revenue statement does not meet the definition of a trade secret. We also determine that Hertz has not sufficiently demonstrated its claim under section 552.110(b). *See generally* Gov’t Code § 552.022(a)(3) (terms of contract with governmental body are generally not excepted from public disclosure); Open Records Decision Nos. 541 at 8 (1990) (public has

interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors); Freedom of Information Act Guide & Privacy Act Overview at 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government). Thus, the airport may not withhold the revenue statement under section 552.110 of the Government Code.

Hertz's final assertion is that its revenue statement is excepted under section 552.131 of the Government Code. Section 552.131(a) provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a). Hertz does not explain, nor does the submitted document reflect, that the airport is negotiating with Hertz or any other party to locate, stay, or expand in or near the airport. Moreover, we have already determined that the revenue statement may not be withheld as Hertz's proprietary commercial or financial information. Accordingly, we find that section 552.131 does not apply in this instance. Since Hertz has failed to demonstrate that any of its claimed exceptions to disclosure apply, we conclude that Hertz's revenue statement must be released within ten calendar days as noted below.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

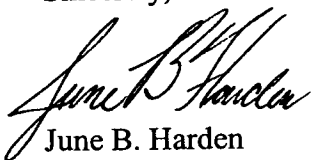
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 199718

Enc: Submitted documents

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